Supreme Court of the United States

October Term, 1915

No. 508

WILLIAM BOYD WHITE, Receiver of
COWARDIN, BRADLEY, CLAY & Co., *Appellant*,
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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Supreme Court of the United States.

October Term, 1915—No. 309.

WHITE, Receiver,

vs.

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I.

TABLE OF CASES CITED.

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BRIEF FOR APPELLANT.

2.

STATEMENT OF FACTS.

On March 19, 1903, Lieutenant-Colonel A. M. Miller, Corps of Engineers, United States Army, issued an advertisement inviting proposals for work and materials for a filtration plant to be constructed in Washington, District of Columbia, for the purification and filtration of the entire water supply of the city.

The plans and specifications, which were prepared by the War Department and issued on the same date as the advertisement for bids, consisted of 23 numbered plans showing the plant generally and in detail, and elaborate printed specifications containing *294* numbered paragraphs describing the method of work, the kind of materials, together with the system of Government supervision, inspection, and so forth.

Under the method of bidding proposed by the United States the whole work was divided into seven classes, known respectively as Class A, B, C, D, E, F and G. Bids could be submitted for any or all of the classes, but under the method prescribed separate prices had to be submitted for each class and for each item under each class.

The present appellant's firm, on the 6th day of April, 1903, entered into a contract "to furnish all the materials (except cement)" and "do all the work necessary under Class A and Class B of the attached plans and specifications, in full accordance with the terms of said plans and specifications."

It will be noticed that the contractor under this contract had no duties in reference to the other five classes of work to be done, although the plans and specifications covering them became a part of his contract with the United States.

By the terms of the contract the United States agreed to pay, "as specified, the following sums for materials furnished and work done, all quantities being more or less:—

"Class A—
"for 880,000 cubic yards excavation,
"for 65,400 cubic yards embankment under filters,
"for 46,700 cubic yards other embankment, and
"for 123,400 cubic yards filling over filters,
"all at 30 cents per cubic yard;
"for 2,000 cubic yards puddle at $1.00 per cubic yard,
"for 31 acres seeding at $75.00 per acre,
"for 9,700 square yards sodding at 25 cents per square yard."

Class B covered concrete in floors, walls, piers and vaulting, granolithic pavement, and for placing materials in masonry and drainage of roofs. No question arises under class B, and it is therefore not set forth in detail.

The plans showed as a feature of the work a road or driveway to be constructed about the reservoir, at a considerable height above the filter beds. There were other streets and roadways already existing, which crossed or bordered on the plant. These were to be left in existence, and nothing was to be done on them; nothing was done on them, and no question arises in reference to them.

The driveway or road which was to be constructed by the contractor constituted the western boundary of the space occupied by the filters. This roadway was shown on all the plans, except those consisting of details of the filters, etc.

It appears on the general plan of the works (General Plan No. 1). It appears on sheet No. 4, which was a general plan showing finished surfaces. It appears likewise on sheet No. 2, which showed the work in sections; and on sheet No. 16. It appears in detail also in plan No. 1 of June 14, 1904, and No. 2 of June 14, 1904, the last two being working plans showing in detail the grades to which the road was to be constructed.

The road was thus clearly shown by the plans, and the specifications incorporated the plans as follows:

> "The general extent, location and character of the work are shown by a set of 23 plans, numbered from 1 to 23 consecutively, which plans are made a part of these specifications."

Under the head of

"EMBANKMENT. ITEMS NOS. 2, 3, AND 4,"

the specifications read:

> "57. The work under this heading includes the filling of low places under filters and other structures, the filling of central courts, the embankment about the filters and all other fills and embankments shown by the plans or directed to be made by the Engineer Officer in charge.
>
> "58. *Classification.*—Embankments shall be divided into three classes:
>
> "1. Embankment under filters,
>
> "2. Embankments about the walls of filters and in courts,
>
> "3. Filling over filters.

"Material placed below the dam, in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment. When waste embankments come against the walls of filters or the pure-water reservoir the usual section shall be built and paid for as embankment and all materials outside shall be treated as waste."

There was no further reference to any road to be constructed by the contractor, and the only other mention of "roadways" of any kind occurs in paragraphs 293 and 294, which read:

"293. *Work Done by the United States.*—The United States will construct the gate-houses, sand washers, pumping station, macadam roadways and other structures not included in these specifications and necessary for the completeness of the plant and the work to be done under these specifications shall be carried on so as to facilitate and not discommode the prosecution of that and other adjoining and contiguous work, whether done by the United States or by another contractor.

"294. *Roadways.*—The United States shall cause to be maintained by the contractor reasonable passageways and roadways, leaving the necessary clear space, and the work under each class shall at all times be so carried on as not to interfere with any other work done in connection with this plant."

The road for the building of which the contractor claims compensation is a permanent elevated driveway extending around the reservoir of the filtration plant. (Findings I, II, III, IV.)

The contractor made this road, and nearly completed it. He was paid as the work on it progressed, to the total amount of $12,000.00. The Engineer Officers of the United States supervised the work, inspected it, and it was accepted and paid for as work done in accordance with the plans which were embodied in the contract. Supplemental plans of the road giving details were also furnished by the United States to the contractor, according to the terms of the contract. Payment for the road work was made in the manner provided for by the specifications, and vouched for as "other embankment," by the engineer officer in charge. (Findings V, VI.)

Then on February 14, 1905, after the road had been practically completed (all but about 6,000 cubic yards), the United States officer in charge told the contractor that no more would be paid for on account of work on the road. The contractor soon ceased work on it.

In the final payment, the $12,000 already paid to the contractor on account of the road was deducted by the United States.

Consequently the contractor has received nothing for his work.

There were 67,578 cubic yards of inspected material which he had used for the construction of the road. He claims $20,273.40, which is at the contract price of 30 cents a cubic yard, and damages. (Findings IX.)

The contractors' receiver brought suit in the Court of Claims July 25, 1906. On October 14, 1907, the death of the receiver was suggested and the appellant was substituted as party claimant. On October 16, the Attorney General filed a denial of "each and every allegation" of the petition. On June 3, 1912, the case was submitted. On November 21, 1912, the Court remanded the case for oral argument. On the same day, after being argued, the case was submitted. February 10, 1913, the Court of Claims found the facts as above substantially stated, and dismissed

the petition. From this judgment, a motion for a new trial having been overruled, claimant duly appealed to this Court.

3.

SPECIFICATION OF ERRORS.

The Court of Claims erred:

1. In holding that the work of building the road was work done outside of the contract.

2. In holding that the plaintiff's claim was based on a single item of the specifications, and not on the contract as a whole.

3. In ignoring and failing to give any force to those parts of the agreement shown by the following provisions:

> "The general extent, location and character of the work are shown by a set of 23 plans, which plans are made a part of these specifications." (Spec., 45; Transcript of Record, 6.)
>
> "The plans and specifications are intended to be explanatory of each other, but should any discrepancy appear, or any misunderstanding arise, as to the import of anything contained in either, the explanation of the Engineer Officer in charge shall be final and binding on the contractor; and all directions, explanations, and detailed or corrected plans, required or *necessary to complete any of the provisions of these plans and specifications and give them due effect* will be given by the Engineer Officer in charge." (Spec., 285; Transcript of Record, 9.)
>
> "The said party of the second part agrees to furnish all the materials (except the cement) and do all the work necessary under Class A and Class B *of the attached plans* and specifications in full accordance with the terms of said plans and specifications."
>
> "And the said party of the first part [Lieut.-Col.

> A. M. Miller, United States Army] agrees to pay to the said party of the second part [the contractor], *as specified,* the following sums for materials furnished and work done, all quantities being more or less * * * for forty-six thousand seven hundred (46,700) cubic yards other embankment * * * 30 cents per cubic yard."

4. In so construing the contract as to render meaningless the provision of Specification 57 as to "all other fills and embankments shown by the plans or directed to be made by the Engineer Officer in charge."

5. In holding this road to be a "low place," and ignoring the obvious fact that it was, on the contrary, a high place.

6. In mistaking and misprinting part of specification 58, so as to change its meaning, viz:

> "Material placed below the dam, in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment."

This is misprinted in the opinion by changing "roadways" to "roadway" and by inserting a comma:

> "Material placed below the dam, in the *roadway*, and at other low places * * *."

and the opinion is re-misprinted in the transcript of record, so that it now reads:

> "* * * the dam, in the roadways, and at other low places * * *."

7. In concluding upon the findings of fact that claimant is not entitled to recover.

8. In holding that the roadway was a "so large part of

the work" and a work of "magnitude" when it was only a piece of work involving the payment of $20,273.40 out of a contract involving the expenditure of $3,468,405.00.

9. In making a finding meaningless by trying to state comparative costs, without the mention of any standard or positive base of comparison, or any amount in money, viz:

> "The roadway in question was *just as convenient* a place *as any* to dispose of waste material, and the cost to the contractor was *no more* than it would have been to place it in the Soldiers' Home grounds."

So that no fact is found or stated thereby.

10. In not making a reasonable and coherent construction of the contract, under which both parties acted, which gives force to all its provisions, and adopting instead a forced interpretation, which no one had thought of, which ignores the plain meaning of the instrument.

11. In holding that the interpretation put on it by themselves is the only one of which the contract is susceptible, and not considering that the construction by Colonel Miller, under which claimant was paid $12,000 on account of the road work, was a construction of which said contract was susceptible; and that the work done by the claimant in good faith and the money paid therefor relied on a practical construction of the contract which cannot now be reversed, especially where the work done and the materials provided under said construction have been used by the United States to its benefit.

12. In not applying to the case at bar the rule of such cases as *Gibbons v. United States,* 109 U. S., 200, and *District of Columbia v. Gallaher,* 124 U. S., 505, which hold that where the terms of a contract are not clear the practical construction of the parties should prevail.

13. In holding that claimant could not recover upon *quantum meruit* even if the work, though not within the con-

tract, was of advantage to the Government, on the ground that the findings show that said work involved no *extra* expense to the contractors.

4.

ARGUMENT.

I. The work done on the road was in pursuance with and within the contractor's contract with the United States.

II. If any doubt remain as to the correct interpretation of the contract, the practical construction of the parties should prevail.

I.

The work done on the road was in pursuance with and within the contractor's contract with the United States.

The above proposition, appellant submits, can be established from the face of the instrument itself, taking the instrument as a whole by demonstrating:

a. That the instrument by its language and diagrams includes this road as work to be performed.

b. That the instrument provides for the payment for this work.

c. That no contradiction exists in the instrument, naturally construed.

d. That, on the contrary, if the theory of the United States attorney be adopted the language of some parts of the instrument becomes inappropriate, and ceases to be relevant.

e. That the alleged discrepancy in quantity between the 46,700 cubic yards of other embankment contemplated by the original contract and the amount of 67,578 cubic yards actually put in is explained by reference to the terms of the contract itself, coupled with the conduct of the parties thereunder.

a.

The instrument evidencing the contract between the United States and appellant consists of a paper-writing dated April 6, 1903, which reads:

"Form 19a.

"1. This agreement, entered into this sixth day of April, nineteen hundred and three, between Lieut.-Colonel A. M. Miller, Corps of Engineers, United States Army, of the first part, and S. P. Cowardin, James F. Bradley, S. P. Clay, Thos. E. Stagg, and M. Kelly, partners composing the firm of Cowardin, Bradley, Clay & Company, of Richmond, in the County of Henrico, State of Virginia, of the second part: Witnesseth that in conformity with the advertisement and specifications hereunto attached, **which form a part of this contract** * * *."

Turning to the advertisement and specifications, we find the following, among other provisions:

"*45. Plans.*—The general extent, location and character of the work are shown by a set of 23 plans, numbered from 1 to 23, consecutively, **which plans are made a part of these specifications,** and which plans are on file at the office of the Washington Aqueduct."

Thus we see that the plans are incorporated in the specifications and thereby become a part of the agreement of April 6, 1903.

It is determined by the Court of Claims that the plans showed a roadway bordering the reservoir west of the filter beds. (Finding IV.)

Accordingly the legal effect of the beginning of the written contract is the same as if it had read:

"This agreement * * * witnesseth that in conformity with the advertisement and specifications which show a roadway bordering the reservoir west of the filter beds, * * * [and other things] which form a part of this contract * * *."

The sentence proceeds:

"* * * the said * * * Miller * * * * * * and the said Cowardin, Bradley, Clay & Company do covenant and agree to and with each other, as follows:

"The said party of the second part [the firm] agrees to furnish all the materials (except the cement) and do all the work necessary under Class A and Class B of the attached plans and specifications in full accordance with the terms of said plans and specifications;"

We naturally inquire what Class A and Class B are, and on turning to paragraph 24 of the specifications we find:

"Class A. Excavation, embankment, puddle, seeding and sodding.

"Class B. Concrete masonry, granolithic pavement, placing materials in masonry, and drainage of roofs."

Now that we know what Class A and Class B are we see that this part of the sentence quoted previously is the same as if it read thus:

"[The firm] agrees to furnish all the materials (except the cement) and do all the work necessary, of excavation, embankment, puddle * * * [etc.] * * * to fulfill the attached plans and specifications, which (among other things) show a roadway bordering the reservoir west of the filter beds."

At this point we look at the plans, and see that the proposed road bordering the reservoir west of the filter beds is a road projected to run at a considerable elevation above the original surface of the ground, on an embankment.

(Appellant's counsel begs to say parenthetically that it would comfort him greatly if he felt sure that every reader of this brief will actually consult the plans which are before the Court as a part of findings IV and V, and thus see, in visible form, the road laid out as a part of the work.)

We notice nothing on the plans to distinguish this proposed road from any other part of the work to be done. We see readily that this road is to be constructed by making an embankment.

The Government will admit that the only way to build the proposed road is by first making an embankment. With such permission as may be allowed us by the learned counsel for the Government, we will call this proposed road what in fact it was, a road-embankment, and, as it is the only one of its kind shown on the plans or involved in the contract we will take the further liberty of calling it "**the** road-embankment," and of paraphrasing the written contract as follows:

> "[The firm] agrees to furnish all the materials (except the cement) and do all the work necessary of excavation, embankment, puddle * * * [etc.] * * * to fulfil the attached plans and specifications which show (among other things to be made) the road-embankment."

Or in short form:

> "[The firm] agrees to furnish all the materials (except the cement) and do all the work necessary of * * * the road-embankment."

Counsel for the Government undoubtedly will admit the justice of this paraphrase, their position being that the contractor was obliged to build the road-embankment.

b.

It is denied, however, that the Government is under a liability to pay for this work.

The liability of the Government to pay rests upon the next clause of the written contract, which reads:

> "And the said party of the first part [Lieut.-Colonel Miller for and in behalf of the United States] agrees to pay to the said party of the second part [the firm], as specified, the following sums for materials furnished and work done, all quantities being more or less: Class A. For eight hundred and eighty thousand (880,000) cubic yards excavation, for sixty-five thousand four hundred (65,400) cubic yards embankment under filters, for forty-six thousand seven hundred (46,700) cubic yards other embankment, and for one hundred and twenty-three thousand four hundred (123,400) cubic yards filling over filters, all at thirty (30) cents per cubic yard * * * [etc.]."

By this language the United States agrees to pay for 46,700 cubic yards of other embankment than that under filters at 30 cents per cubic yard, the quantity being stipulated as "more or less."

The road-embankment was without doubt "other embankment." Then and there is an end of this case and the claim is clearly good, except for two considerations raised by the Government which must be weighed at this point.

The first consideration raised by the Government is that some embankment other than the road-embankment is meant by the words "other embankment." Of course, if something else than the road-embankment is intended it will be

shown in the plans, or clearly stated and explained by the specifications, or the other findings of the Court of Claims based on the evidence.

No "other embankment" is shown by the plans, unless it be the road-embankment.

No "other embankment" is mentioned in the findings of fact set out by the Court of Claims, nor is any part of the work pointed to which involved any "other embankment" unless it be the road-embankment.

No "other embankment" is stated in the specifications except it be the road-embankment.

The natural place to look in the specifications is at Specification 57, the first paragraph under the section headed

"A. Embankment. Item Nos. 2, 3, and 4."

The "A" refers to the work under Class A, which we have seen consists of excavation, embankment, etc. "Item Nos. 2, 3, and 4" refer to the embankment to be paid for under the contract, which we have seen was:

"65,400 cubic yards * * * under filters.
"46,700 cubic yards other embankment,
"123,400 cubic yards filling over filters."

By consulting the plans it is clear that all the "embankment" (or "filling," the words being used interchangeably), except the road-embankment in suit, was embankment under or over filters.

With this condition in mind let us read Specification 57, which says:

"A. Embankment. Items Nos. 2, 3, and 4.

"57. The work under this heading includes the filling of low places under filters and other structures, the filling of central courts [these were the spaces over

and between the filters], the embankment about the filters, and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge."

In other words, the "other embankment" is, if anything, "all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge."

Now, the road-embankment is the only "other embankment" shown by the plans, and is clearly indicated by this language. If there were nothing further there could be no excuse for contending that the Government had not promised to pay for the road embankment.

But the Government points to this specification next following:

"58. *Classification.*—Embankments shall be divided into three classes:

1. Embankment under filters,
2. Embankments about the walls of filters and in courts,
3. Filling over filters.

"Material placed below the dam, in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment. When waste embankments come against the walls of the filters or the pure-water reservoir the usual section shall be built and paid for as embankment and all materials outside shall be treated as waste."

The Government's argument is that, as no provision is made under this classification for the road-embankment, that it cannot have been contemplated by the phrase "other

embankment" in the contract; and it is also urged that the road-embankment falls within the terms of the provision respecting "material placed below the dam, in the roadways and at other low places."

Each of these arguments would have force, taking Specification 58 alone, and looking at it without regard to its relations to the other parts of the contract plans and specifications, and each has impressed the court below as of great importance. Undoubtedly, if well founded, these arguments would show that a conflict exists between paragraph 58 and the rest of the contract. Nevertheless, a careful study of 58 in its relations to the rest of the agreement of which it is a part can only lead inevitably to the following conclusions:

1. The classification undertaken in 58 relates to the items of 65,400 cubic yards embankment under filters and the 123,400 cubic yards filling over filters, and was not intended to relate at all to the 46,700 cubic yards of other embankment which were planned to go into the road-embankment, and had been recognized by 57.

2. The road-embankment was not referred to as "below the dam" or by the words "roadways and other low places." nor as "all materials outside"; and none of this paragraph refers to the road-embankment at all.

To take the second subject first, as it can be more quickly treated.

> "Material placed below the dam, in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the grounds shall not be paid for as embankment."

These words are capable of two constructions. If the clause "in the roadways and at other low places" is subordinate to the clause "material placed below the dam," then the sentence refers to two distinct dispositions of ma-

terial, the first being that of material placed **below the dam, in roadways and at other low places** (all being below the dam), and the second "material disposed of off the ground."

Should this construction be adopted no question can arise about the road-embankment, for, as can be seen readily from the general plan, no part of the road-embankment in question is below the dam.

But it is possible that the sentence means something slightly different. It is possible that the phrases "below the dam." "in the roadways and at other low places" are coördinate, the words "material placed" being omitted by ellipsis, but understood as if repeated before the words "in the roadways and at other low places." In that case the sentence means:

> "Material placed below the dam, material placed in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment."

If this be the proper construction, it is clear that the "roadways" in mind, whatever they are or wherever they may be, are "low places." "Roadways and other low places" can only mean "roadways which are low places and other places which are low also."

The road-embankment proposed was not, nor was its site a "low place." It was, on the contrary, very much higher than the filters, and even before any embanking had begun its site was many feet higher in level than the level shown by the plan for the finished tops of the filters, as can readily be seen by consulting the plans which are a part of finding IV. It is very strange that if the road-embankment was meant, it should be called "low."

It should further be borne in mind that the name "the roadway" is only applied to the road-embankment by the Court of Claims in its findings as a convenient substitute

for the expression "driveway about the Washington City reservoir." (See second paragraph of Finding III.)

Thus it seems clear that the "roadways" spoken of in connection with "other low places" were not the same as the road-embankment around the reservoir, which the findings call "the driveway" and afterwards the "roadway," but we cannot be sure of this, perhaps, unless we find some other roadways in the work which would fulfil the description.

On referring to paragraph 294 of the specifications we find the roadways which were intended. They are mentioned appropriately enough under the heading "Roadways" and are evidently what the writer of paragraph 58 had in mind, if the second construction of that paragraph be the correct one.

> "294. *Roadways.*—The United States shall cause to be maintained by the contractor reasonable passageways and roadways, leaving the necessary clear space, and the work under each class shall at all times be so carried on as not to interfere with any other work done in connection with the plant."

The site of the plant was excavated to a considerable depth and covered about 30 acres (Specification 46). Hence this provision for the maintenance of reasonable roadways, which would be, of course, "low places," just as the roads in any great excavation work would be.

There were also other roadways not shown by the plans, to which 58 may have had reference. These roadways were the macadam roadways mentioned in Specification 293.

> "293. *Work Done by the United States.*—The United States will construct the gatehouses, sand washers, pumping station, mecadam (*sic*) roadways and other structures not included in these specifications

and necessary for the completeness of the plant and the work done under these specifications shall be carried on so as to facilitate and not discommode the prosecution of that and other adjoining and contiguous work, whether done by the United States or by another contractor."

Is it not likely that it is the "roadways" of 294 or the macadam roadways of 293 which are in contemplation in 58? And is not this conclusion irresistable when we realize that the road-embankment was never thought of or referred to as the "roadway" in the construction of the plant or by the contract?

There remains to be taken up the other question raised on Specification 58. The United States insists that the classification therein stated relates to the item of 46,700 cubic yards of "other embankment" as well as the 65,400 cubic yards of embankment under filters and the 123,400 cubic yards of filling over filters.

Appellant does not so construe the paragraph. On the contrary, he asserts that the classification of 58 only applies to "embankment" as distinguished from "other embankment." There was no occasion to classify "other embankment." It had already been set apart by paragraph 57, and was not capable of being further classified.

Paragraph 58 merely deals with the embankment which is not called "other embankment" and classifies it. The occasion for classifying it is that there will be set forth in later paragraphs the methods of building this embankment.

"Other embankment" has been dropped, as it is sufficiently shown in the plans. As there is no occasion for mentioning it further it is not mentioned.

The specifications thus follow a perfectly logical sequence of thought.

First, in 57 the work under the heading "Embankment"

is defined, generally, to be the filling of low places under filters, the filling of central courts, the embankment about the filters and all other fills and embankment shown by the plans or directed to be made by the Engineer Officer in charge.

Then in 58, discarding "all other fills and embankments shown by the plans" as being thereby sufficiently specified, the embankments which are to be further discussed are classified as

1. Embankment under filters.
2. Embankment about the walls of filters and in courts.
3. Filling over filters.

It will be noticed that each of these is worded differently from 57.

Now, why is "other embankment" not mentioned? Simply and solely because there is nothing peculiar about it. It is just plain embankment which can be readily made by following the plans.

59, 60, 61, 62 give the elaborate details for embankment under filters. It is clear now why a classification was made in 58. It is so that "embankment under filters" may be distinguished from other kinds of embankment. It is also obvious why "other embankment"—*i. e.*, the road embankment—was not mentioned in 58. To do so would have done no good and might have caused confusion. It would be at best repetition, and, the specifications being a practical document, avoid repetition.

The reason for classification is to point out that the type of embankment to be put under filters is to be a special kind. The ground is to be specially prepared by the removal of all loose fill and soft material (59). The ground shall then, after the removal of loam and top soil, "be furrowed or picked up to make a bond" with the filling or

embankment "and on sloping ground shall be steeped as directed by the Engineer Officer in charge."

61 and 62 proceed with further particulars which need not be stated.

When the special mode of embankment under filters has been set forth, then in 63 come the provisions for embankment about the walls of filters and in courts, which is one division of the filling or embankment over filters, mentioned in the contract.

Nowhere are special directions laid down for ordinary embankment, as it was naturally assumed that the plans plus ordinary common sense were a sufficient guide.

It would appear that the classification made in 58 was a classification of embankment by **method** and not by **location.**

If 57, 58, 59, 60, 61, and 62 are read consecutively it is seen that no contradiction is involved, with our theory that 58 has no reference to the 46,700 cubic yards of "other embankment."

By the Government's theory the "other embankment" is the same as "embankment about the walls of filters and in courts."

Under that theory the words

"all other fills and embankments shown by the plans" are totally disregarded.

It should be noted that in 59 Embankment under filters is specified as "Item 2." 63 specifies Embankment About Walls of Filters and in Courts as "Item 3." These designations, which appellant hereby calls to the due attention of Government counsel and of the Court, have been previously overlooked.

So far as these designations have any bearing, the use of the latter accords with the Government's theory of the meaning of 57 and 58.

It is submitted, however, that this is too slender and nice a point on which to hinge a construction of the contract

which leaves 57 still standing in consistency with the rest of the contract and the plans, but without any force, as a sort of misrepresentation to trap the contractor.

Indeed, the adoption of such a view is equivalent to striking out Specification 57 altogether.

Other incidents of the work done under the contract were such as to confirm our belief that the road-embankment was part of the work to be paid for as "other embankment."

A part of the road-embankment was sodded (Finding VI, paragraph 1), in accordance with the contract provisions for sodding. If the road-embankment did not come within the contract how very curious it is that it should be sodded under the contract provisions.

If the road-embankment work was not to be paid for, one would suppose that that fact would have been made clear by some definite words of exclusion. No such words exist. On the other hand, 44,000 cubic yards were put into the road-embankment and paid for under the terms of the contract. Twenty-three thousand more cubic yards had been put in, and had not been paid for. The action of the Engineer Officer in charge in furnishing detailed plans and in paying for the 44,000 cubic yards, resolved any doubt which might have arisen under the original provisions or, consequent on the increased yardage necessitated by the change in the part of the road near the pumping station. (Compare the maps of June, 1904, Finding V, with those of March, 1903, Finding IV.) This is covered by the following provisions:

> "All directions, explanations and **detailed and corrected plans** required or necessary **to complete any of the provisions** of these plans and specifications and **give them due effect,** will be given by the Engineer Officer in charge."

That provision cannot be acted on and then the consequent responsibility shirked.

See also this clause:

> "The plans and specifications are intended to be explanatory of each other, but should any discrepancy appear or any misunderstanding arise, as to the import of anything contained in either, the explanation of the Engineer Officer in charge shall be final and binding on the contractor."

It would be hard to think of a more complete explanation than that involved in handing to the contractor detail plans of the road-embankment, and payment for the work done in accordance therewith.

How was it possible to imagine that the road-embankment was not "other embankment" when it was being paid for as such? The contractor had also agreed to these provisions:

> "28. The contractor will not be allowed to take advantage of any error or omission in these specifications as full instructions will always be given should such error or omission be discovered."

If there were any error, and instead of "full instructions" being given, the contractor was simply told that no more would be paid for a certain feature of the work, and a sum of money already paid to him was deducted from what afterwards was due him, it is clear that the contractor has done no wrong, but that the United States failed in its duty, on discovery of the error, to give him full instructions.

The following provision also was a part of the agreement:

> "29. The decision of the Engineer Officer in charge shall be final."

The construction of the contract made by the Engineer Officer in charge when he furnished detail plans of the road-embankment, gave grades, lines and slopes, required the sides of the completed part to be sodded, and confirmed this construction of the contract by paying $12,000 on account of work done on the road-embankment, was a decision of the Engineer Officer in charge. By 29 it should have been final. Reversal of this decision, especially after the work had been done, was a breach of this provision of the contract.

"The decision of the Engineer Officer in charge shall be final"—yet the Engineer Officer in charge, not Colonel Miller, who had drawn the contract and knew its provisions, ventured to reverse a decision which by the terms of the contract was final.

Another provision of the contract broken by the United States was this:

> "39. Once in every month the Engineer Officer in charge will make an estimate of the work done and materials delivered and will pay the contractor **the amount due,** less ten (10) per cent., which will be retained until the completion and final acceptance of the work done and materials delivered under these specifications."

By virtue of this clause the payment of $12,000 on account of work done on the road-embankment was a payment of an amount due the contractor and as such, if there were any doubt about the contract provisions, involved a decision of the Engineer Officer in charge. If these monthly estimates were not binding on the United States and payments under them were not binding on the Engineer Officer in charge and his successor, there would be a breach of the terms of 39.

c.

If the natural construction of the instrument be adopted, there is no contradiction in it, and full force is given every part of it, except the figure 3 in the first line of paragraph 63. All the language is given full force. All the plans are given full force. Everything is consistent, and all the parts of the agreement form a consistent whole.

d.

But if the present theory of the Government be adopted we encounter many contradictions. The whole of Specification 57 must be discarded, part of it being directly contrary to the Government's present theory, and the rest being surplusage. Certain features of four of the plans—everything in them showing the road-embankment—must be discarded or regarded as contradictory. All the references to the plans and the several provisions making the plans a part of the contract must be explained away or regarded as contradictory. This might be a possible feat of construction if the work under Class C, D, E, F or G could possibly have reference to the road-embankment shown on the plans. But these classes all provide for work and materials which do not have the slightest relation to the construction of a road-embankment.

Under the Government's present theory, what possible explanation can be made of the detail plans furnished the contractor and mentioned in finding V? How can 285 of the "General Clauses" be explained, taken in connection with the furnishing of these detail plans?

How can 28, 29 and 39 of the "General Conditions" be reconciled with the action of the Engineer Officer in charge?

How can the present attitude of the Government be squared with its attitude prior to February 14, 1905?

How can the sodding of this work be made consistent

with the theory that the road-embankment was not a part of the contract work? How explain the giving of lines and grades? Or the inspection of the embankment?

One more section of the specifications seems strongly contradictory of the present theory of the Government.

Under the head of

"Work to be Done under These Specifications"

it is provided:

> "53. *Disposal of Excavated Material.*—All materials suitable for use for puddles, or the requisite amount thereof, shall be set aside and reserved for this purpose; and other **select materials shall be reserved and used for embankments, filling, and for covering the filters.**"

Then follows the only specific mention of deposit of surplus material, which, under the rule of *expressio unius exclusio alterius,* would clearly imply that the road-embankment could not be contemplated as a place for the disposal of surplus material. It is this:

> "A part of the surplus material shall be deposited on the south slope of the dam and carried to such lines and slopes as the Engineer Officer in charge shall direct. All trees, bushes and rubbish shall be cleared from the slope and adjacent ground at the foot of the dam before the material is deposited. The contractor must make all arrangements for the disposal of surplus material and hold the United States harmless against all claims whatever relating thereto."

If the road-embankment was to be another such place and was not "other embankment" under the contract we

should expect it to be mentioned here. But there is no word of it.

This Specification 53 is diametrically opposed to the Government's present theory.

Thus appellant claims that it is only fair to construe the agreement in accordance with its natural and consistent meaning, and insists with more confidence as he believes that construction is in accord with the intent of the parties and is the same construction for which he has always contended, on the basis of which his firm made its bid, and on which the United States acted until February 14, 1905.

On the faith of such an agreement the appellant's firm performed the work called for, and it is, he submits, unbecoming and contrary to the agreement itself to deny him his wage.

e.

The only other argument against the appellant's construction of the contract is that the amount of cubic yards actually put into the road as determined by the Court of Claims was 67,578 cubic yards. Defendant's counsel argues that it is not possible that the contract provision for the payment for "46,700 cubic yards more or less," of other embankment can apply because the discrepancy between the two figures amounts to nearly 21,000 cubic yards.

This discrepancy, however, is explained by the fact that the original plans provided for a road which was to consist of only a single right of way in the neighborhood of the Pumping Station. Subsequently the plan was adopted of having a road which ran around the pumping station on each side, so that it became a road which divided and went around the pumping station on either side and united again after passing it. This divided roadway is for the first time shown in the detailed plans which the Engineer Officer in charge gave

to the contractor, as found by the Court of Claims in Finding V, of which the plans have been made a part. The amount of yardage necessary to build such a road as shown by these supplementary detailed and corrected plans was as determined by the United States 67,578 cubic yards. See Finding IX. The contractor accepted these plans and proceeded to work under them. He was justified in doing this by the provision of the contract found under the heading of General Clauses, in Specifications 285, which reads as follows:

> "All directions, explanations, and **detailed and corrected plans required or necessary to complete** any of the provisions of these plans and specifications and **give them due effect,** will be given by the Engineer Officer in charge."

The action of the parties in proceeding with the work under the detailed and corrected plans which called for a larger quantity of other embankment than the 46,700 cubic yards set forth in the original contract was justified by the clause of the contract quoted above, and the United States so proceeded and thereby accepted liability thereunder to pay for 67,578 cubic yards in accordance with the terms of the contract.

This intention of the United States was manifested by the actual payment for 44,444 cubic yards at the contract rate.

II.

If any doubt remain as to the correct interpretation of the contract, the practical construction of the parties prevails.

Garrison v. United States, 7 Wall., 688.
District of Columbia v. Gallaher, 124 U. S., 505.
United States v. Gibbons, 109 U. S., 200.
Lowry v. Hawaii, 206 U. S., 222.

There is no surer way to find out what parties meant than to see what they have done.

Insurance Company v. Dutcher, 95 U. S., 269.

The practical construction given to this contract by the parties was that the road was included in the work to be done and to be paid for at the contract price as "other embankment."

In *Chicago v. Sheldon,* 9 Wall., 50, the question arose on a stockholders' suit to enjoin an assessment by the city of Chicago on a street railway company for street paving improvements, the charter of the company providing that the company should "as regards the grading, paving, macadamizing, filling, or planking of the streets" upon which the tracks were laid, keep a certain number of feet "in good repair and condition" in accordance with orders "respecting the ordinary repairs thereof" adopted by the common council. The city assessed the company $26,677 for a new grading, curbing and paving.

The Supreme Court said that the contract related only to **repairs,** and that a fair and reasonable interpretation favored such a view; and that the clause concerning repairs was present to the minds of the parties.

> "What adds great weight to this point of view is, it accords with the practical construction given to the contract by both parties. * * * In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to a great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment it can be settled only by the arbitration of the law. But in an executory contract, and where its

> execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one."

Applying this rule to the present situation, the intent of the parties as illuminated by their practical construction of the contract was clearly that the road-embankment was work payable under the contract. The test of a practical construction is not that of a unilateral construction, but of a mutual construction. The Court of Claims in the case at bar took a narrow view of the rule of the practical construction of the parties, saying:

> "The plaintiff contends that the allowance for a time by the engineer in charge for the fill on the roadway as coming within the provision for fill or embankment for which the contractors were to be paid, was a practical construction of the contract which must now prevail. The answer to this contention is that such construction was afterwards and during the progress of the work reversed; also that the rule invoked prevails only where the contract is susceptible of more than one interpretation."

With deep respect to the Court of Claims, it is submitted that the rule of practical construction by both parties cannot in this case be so easily disposed of. If the Court meant to rule that the present contract is only susceptible of the interpretation adopted by the Court, I must humbly protest that to my mind it seems very strange that if the contract was only susceptible of that one interpretation that Mr. McClennan and Col. Miller should both have interpreted it as including the roadway, and never dreamed of any other construction. They were both men of usual mental ability, used to the drawing and practical construc-

tion of contracts, Col. Miller being the author of this contract, and they both thought the contract meant something diametrically opposite from the interpretation of the Court of Claims. Yet the Court of Claims must have considered that practical construction as conceivable, for it is only after a careful analysis and exposition of the contract of over 2,000 words that it arrived at a different construction. If the contract is susceptible of only one consruction, is it not strange that none of the persons who had to do with making the contract ever thought of it? And is it not conceivable that the construction which they put upon the words "all work shown by the plans," considering that the plans showed the roadway, was one which the contract was susceptible or bearing? Assuming for the moment that it was not the correct one, or the only correct one, I strongly urge that it was a possible interpretation. And if the interpretation which these gentlemen with one accord took, even though it appear to a Court an unreasonable one, was a conceivable one (and the fact that they took it shows that it was conceivable to them), I humbly submit that this contract cannot be said to be capable of only one interpretation.

It is to be noted also that the Supreme Court in the Sheldon case does not lay down the rule that the practical construction of the parties prevails only when the *court* thinks the contract ambiguous. It is to prevail when the parties themselves find the contract susceptible of more than one meaning.

> "In an executory contract," says Mr. Justice Nelson, "and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one."

But the Court of Claims says that the practical construction made by the parties "was afterwards and during the progress of the work reversed." That refers to the fact

that after the work was done a new mind in charge for the War Department refused to pay any more for work done on the road. This new mind did not reverse the practical construction of both sides, but did interpret the contract differently for the United States. At that time, 44,444 cubic yards had been put in and paid for under the original practical construction; a good deal more had been put in because the contractor did not suspect that it would not be paid for. That work was done, and had been done under a clear understanding on both sides of what the contract meant.

Does the rule of practical construction of contracts apply only when the entire performance contemplated by the contract is completed under it? Such a rule cannot be found in the cases. It would lead to outrageous results. Suppose A engages in writing B to paint his house three coats of paint at one cent a square yard, payable weekly. The work takes four weeks. For the first three weeks A pays B at the rate of one cent a square yard per coat, which both understand is the contract price. At the end of the fourth week B comes for his pay, but A says: "Oh, I don't owe you anything. In fact you owe me a good deal, because our contract appears to me to mean one cent a square yard painted with three coats."

The cases cited by the opinion below to support such a proposition (which seems to have a tendency to result in hardship) are

Gibbons v. U. S., 109 U. S., 200, and
D. C. v. Gallaher, 124 U. S., 505.

The Gibbons case turned on the construction of a contract with the United States for rebuilding on a navy yard some brick buildings that had been destroyed by fire. The specifications provided:

> "The foundation and the brick walls now standing that were uninjured by the fire will remain and be car-

ried up to the height designated in the plan by new work."

After the claimant had begun work it was discovered that a part of the walls still standing had been so injured by fire as to be useless. The commandant of the navy yard then ordered the buildings further torn down, which was done by claimant and new brickwork built by him at a cost of $4,500. No agreement in writing varying the original contract was entered into.

The Justice of the Supreme Court, who wrote the opinion, observed:

> "The language of the specifications is, perhaps, susceptible of two meanings."
>
> "According to one, it is as if it read that 'the foundations and brick walls now standing **so far as they** were uninjured by the fire, will remain'; according to the other, that the foundations and brick walls now standing **'being such as** were uninjured by the fire,' will remain."
>
> "But (continues the opinion), without going into any refinements of merely verbal interpretation, we think the meaning of the parties, explained by the circumstances attending the transaction, is sufficiently plain."

The decision, as to what wall was fit to remain, should be made by the proprietor at the outset.

> "To require the claimant to determine the fact for himself provisionally, subject at any time before completion of the work to have his judgment reversed, and to be required in consequence to perform work which he could not and did not provide for in his estimates, would be unreasonable and unjust."

Does this case uphold the proposition that a reversal of the practical construction of the parties during the progress of the work deprives claimant of his right to recover in accordance with the original construction of the contract? To me it seems to hold directly against that proposition.

The other case cited by the Court of Claims, in ruling that the practical construction of the parties cannot avail the present claimant, is *D. C. v. Gallaher*, 124 U. S., 505.

In this action the claimant was the contractor for building the Tiber Creek sewer in the City of Washington.

The principal item at issue was a deduction **made during the course of the work** for a failure to observe the specifications.

The Supreme Court said:

> "The whole controversy between the parties as to this item and also for a portion of the claimant's demand on account of extra work and material arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work furnished by the District engineer and the sample of the work which had been done previously by other contractors, and with which that of the present claimant was to connect. The work as actually done was under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

So the Supreme Court upheld the practical understanding of the parties in spite of the fact that the contract literally

construed was contrary to it. Furthermore, the practical construction so far as defendant was concerned, was reversed, just as in the case at bar, after some of the work was done, but before it was all finished, by a different interpretation of the District engineer, and a deduction in pursuance with his interpretation.

D. C. v. Gallaher does not seem to sustain either of the propositions for which it is cited in the opinion of the Court of Claims, but to sustain rather the position of the claimant that, whether or not the contract is susceptible of more than one interpretation, if the parties practically construe it, their understanding prevails, and that after the work is started, a new interpretation by one of the parties cannot affect the status of work which has been finished so that by reacting it deprives the laborer of the benefit of the original practical construction.

Even if the contract is, as the Court of Claims says, not susceptible to any construction other than that arrived at by the Court of Claims (which claimant does not admit) under the authority of the cases cited judgment should be given for claimant.

"The practical construction of an agreement by a party to it is always a consideration of great weight," says the Supreme Court in *Insurance Co. v. Dutcher*, 95 United States, 269.

> "The construction of a contract is as much a part of it as anything else."

(There is no qualification of the rule of practical construction. It is **always** a consideration of great weight.)

> "It was competent for the company, under proper circumstances, at any time to change its rule with respect to the future; but it could not affect vested rights acquired in the past while a different rule prevailed.

> Prior contracts must be carried out as they were when they were entered into. Neither party *in invitum* as respects the other can make any change. When it was proposed by the assurer to apply the new rule and practice in this case, the assured might well say, '*non in haec fœdera veni*,' and insist upon the interpretation which prevailed in other like cases when the parties became bound to each other and continuously for two years later."
>
> *Insurance Co. v. Dutcher*, 95 United States, 273.

In *Old Colony Trust Co. v. Omaha* it was said:

> "Generally speaking the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is of great if not controlling influence."
>
> 230 *U. S.*, 118, citing *Chicago v. Sheldon, Ins. Co. v. Dutcher, D. C. v. Gallaher*, and two Nebraska cases.

In *Lowry v. Hawaii*, 206 U. S., 222, MR. JUSTICE MCKENNA, discussing whether an agreement evidenced by writing between a mission and the Kingdom of Hawaii in the year 1849, relating to the transfer of a mission school to the Crown, should be construed strictly, or whether extrinsic evidence might be admitted to show the real purpose of the transfer as disclosed by the surrounding circumstances and the subsequent conduct of the parties, said:

> "In *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S., 269, it was said: 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs

the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract * * *. The conventions of parties may change such circumstances and conditions or continue them, but it cannot be separated from them, and this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is greater to explain a contract where self-interest is quick to discern the extent of rights or obligations and never yield more than the written or spoken word requires. See, for further illustration, the following:

Reid v. Merchants' Mutual Insurance Co., 95 U. S., 23;
District of Columbia v. Gallaher, 124 U. S., 505;
Topliff v. Topliff, 122 U. S., 121;
Paige v. Banks, 13 Wall., 608;
Philadelphia R. R. Co. v. Trimble, 10 Wall., 337;
Chicago v. Sheldon, 9 Wall., 50;
Cavazos v. Trevino, 6 Wall., 773;
Simpson v. United States, 199 U. S., 399;
Chicago Great Western Railway Co. v. Northern Pacific Railway Co., 101 Fed., 792.

The opinion in *Chicago Great Western Railway Company v. Northern Pacific Railway Company*, 101 Fed., p. 795, contains an interesting discussion on this point, in which it is said:

"It is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest. 'Tell me,' says Lord Chancellor Sugden, 'what you have

done under a deed and I will tell you what that deed means."

Attorney Gen. v. Drummond, 1 Dru. & Wal., 353, 366;

Affirmed by *Drummond v. Atty. Gen.,* 2 House of Lords Cases, 837.

The contract now in question was drawn by Col. Miller in the War Department of the United States, and, of course. the rule of construction which construes a contract most strongly against the draftsmen should be applied.

The words of a contract should be taken most strongly against the Government where it has been drawn by a Government officer and where an officer has given the contract a contemporaneous construction unfavorable to the Government.

Garrison v. U. S., 7 Wall., 688;

In *Gibbons v. United States,* 109 U. S., 204, it is said:

> "The foundation and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done."

Cannot appellant say here with equal justice that, by analogy, the plans showing a road to be built constituted under the circumstances a representation on the part of the United States that such a road was to be built and paid for at 30 cents per cubic yard, on which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done?

Was not this representation confirmed by the contemporaneous construction put on the contract by the United States; by the giving of grades, lines, and detail plans for the work; by the sodding required on the completed part of the work; by the supervision, inspection and acceptance of the work by the United States; by the allowance and payment of $12,000 on account of it; and by the continuance of the United States in this representation until the work was substantially complete?

As a result, the United States has an excellent road built under its plans for which it has paid nothing.

III.

Apart from any rights under the contract, the claimant is entitled to recover upon quantum meruit.

The rule for recovery in *quantum meruit* is that the value of the services to the person who has been benefited should be paid for, considering the question solely as one of benefit and of the value of the services rendered. The law of the present case attempts an entirely new test, to wit: What is the cost to the person rendering the services? The Court of Claims is of opinion that as the building of the road "involved no extra expense to the contractors," it is not within the rule of *quantum meruit*, and accordingly refuse any recompense to the contractor for his labor.

Is it not a great mistake to consider only the question of cost to the contractor? This road could not have been made on separate contract, except for a much greater sum than $20,273.40. It was because the material was available that it was possible to do it at what was perhaps a cost to the contractor of less than $20,273.40.

The question in *quantum meruit*, however, is not what the services **cost,** but what it is fair to pay for them. To say that the contractor could only recover what he has given up at cost price, loses sight both of the element of reasonable

profit, and of the essential element of the benefit to the United States. It is the **value** of the services rendered that should be considered.

Thus in *Belt v. U. S.*, 15 C. C., 92, the value of the goods was recovered; similarly *Livingston v. Ackeston*, 5 Cowen. 531, a leading case on the subject of *quantum meruit*, lays down this rule:

> "No doubt the services of the plaintiff having been performed for the benefit of defendant with his knowledge and approbation the law will imply a promise to pay for them, unless it appears they understood no compensation was to be made. *Jacobson v. Executors of LeGrange*, 3 John., 201."

See also the curious case of *Hickam v. Hickam* (former slave working in ignorance of the Emancipation proclamation), 46 Mo. App., 496.

The correct rule is laid down in *Turner & Otis v. Webster*, 24 Kans., 38, where it is said:

> "Justice is done to all parties by ignoring any promise or understanding about compensation (where the parties had made no contract as to compensation but the services had been performed) and giving to the laborer reasonable compensation for the work done and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor."

It is contrary to human experience to suppose that the work done on this road cost nothing, and we respectfully ask that the benefit of the United States be regarded according to the ordinary rule of *quantum meruit* recovery.

The Court of Claims cited *Plumley v. U. S.* as an authority constraining the denial of a recovery in this action. A

careful reading of that case shows no reference to any question of *quantum meruit*.

The case was that Plumley was working on a contract which contained a clause that in the event of questions rising under the contract the matter should be referred to the Secretary of the Navy, Plumley agreeing in that event to abide by his decision in the premises. The Secretary having decided against him, it was held that the decision was conclusive.

Certain extra work was done of considerable value, but no attempt had been made to get any order for the extra work or to have it approved by the Secretary, as the contract required. It was held that, although it might be a hard case, yet Plumley could not recover for that which, though extra, was not ordered by the officer and in the manner required in the contract. *Plumley v. United States*, 226 United States, 545.

Such a case differs entirely from the present one, in that the present one has no question of extra work, and no suggestion of any violation or disregard by the contractor of any contract provision.

IV.

SUMMARY.

The appellant's firm built the greater part of a road for the United States, which was understood by the parties to have been contracted for to be paid at the price of 30 cents per cubic yard.

When the road was nearly complete, and, after the United States had paid $12,000 to the contractor on account of his work, the United States notified the contractor that he should be paid no more, and took back the $12,000 already paid by retaining that sum from payments due for other work.

The United States has thus obtained an embanked road without cost. (Statement of facts.)

The contractor claims that under his contract the United States was liable to pay for the road, as work within the terms of the contract (I.).

And that even if the literal meaning of the contract could be construed so as not to include the road work, that the practical construction by the parties under which the work was done and in part paid for must prevail.

United States v. Gibbons;
District of Columbia v. Gallaher.
United States v. Garrison, 7 Wallace, 688 (II.).

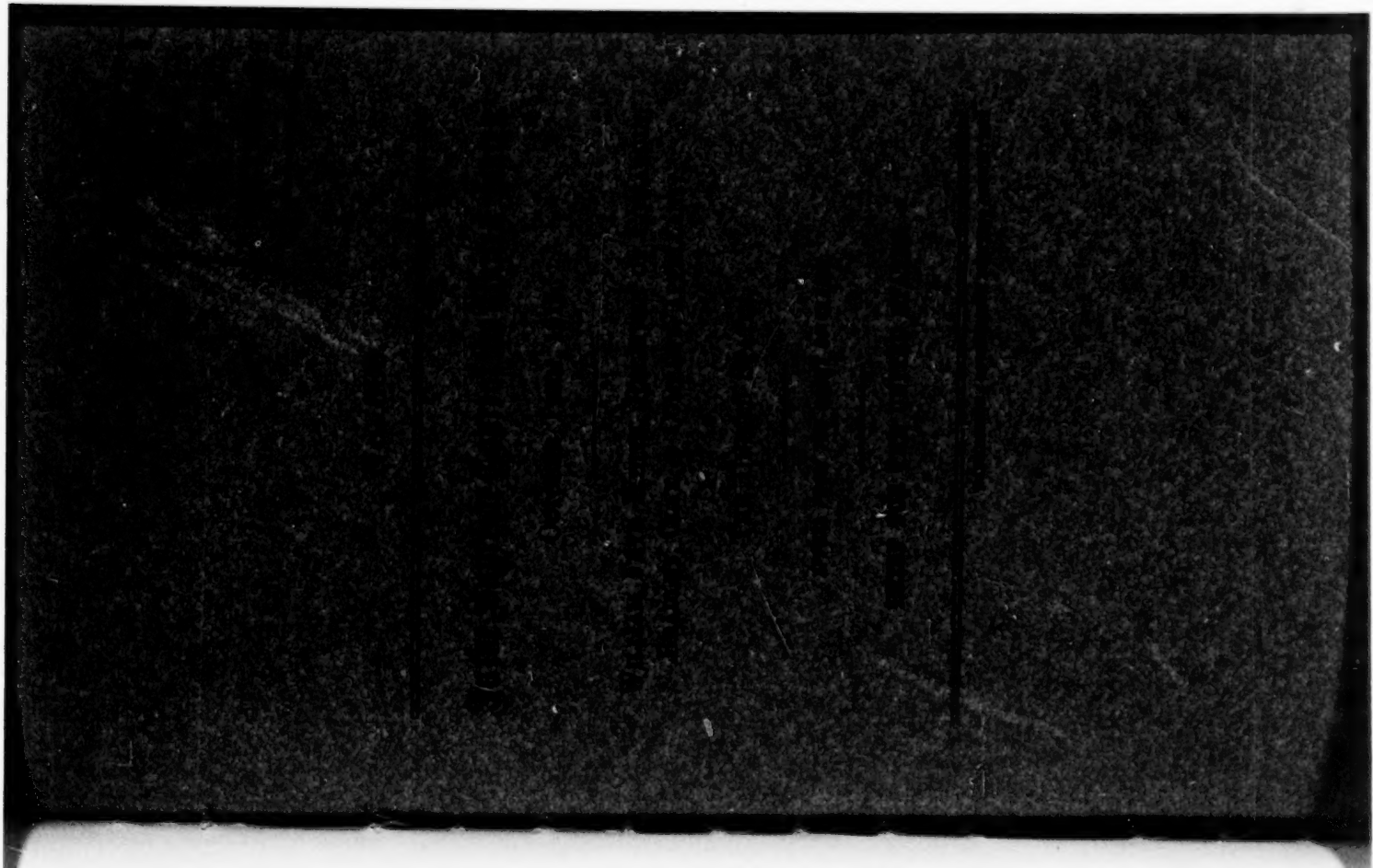
And that in any case, the contractor, having confered a benefit on the United States by supplying the work and materials for the road embankment, should be paid for the value of his services (III.).

Respectfully submitted,

CHAUNCEY HACKETT,
Attorney for the Appellant.

Service of the foregoing brief accepted this 17th day of February, A. D. 1916.

HUSTON THOMPSON,
Attorney for Appellee.
R. P. W.



In the Supreme Court of the United States.

OCTOBER TERM, 1915.

WILLIAM FRYE WHITE, RECEIVER OF COWARDIN, BRADLEY, CLAY & COMPANY, appellant,
v.
THE UNITED STATES.
No. 309.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition.

The suit arose over a contract for the construction of a filtration plant in the city of Washington, D. C.

On April 6, 1903, Cowardin, Bradley, Clay & Company executed a contract with Lieut. Col. Miller, representing the United States, for the furnishing of labor and materials in the construction of said plant. The plans *indicated* a roadway beginning at the superintendent's house at a point northwest

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of the plant, thence running along the west side thereof between the plant and the reservoir, and passing the pumping station in a southwesterly direction around the east side of the reservoir to the south dam of the Washington City Reservoir. Said plans contained no detail whatsoever as to the exact location or dimensions of the roadway; they merely marked where it was to be placed.

On August 27, 1903, John D. McClennan was appointed receiver for the original contractors, and was subsequently replaced by William Frye White.

In January and February of 1904 material excavated from the filter plant was deposited on the said roadway. *In June and November of 1904*, supplemental plans relating to the roadway (Finding V, Rec. 14) and giving details as to grades were furnished, and appellant, who had been depositing excavated material on parts of said roadway, thereafter deposited it along the whole roadway. Several payments, amounting in the aggregate to $12,000, had been made by the Government on roadway estimates of its engineers. On February 14, 1905, Col. Leech, the successor of Col. Miller, as engineer officer in charge, notified the receiver that he refused to allow further payments for work on the roadway. In the final settlement there was deducted from the balance due appellant (Finding VIII, Rec. 16) a sum equal to the cost of the fill in the roadway, already paid at the rate of 30 cents a cubic yard, amounting to about $12,000.

The following paragraphs of the specifications and proposals in this case are pertinent (Rec. 5–11):

29. The decision of the engineer officer in charge shall be final.

43. *Work.*—The work to be done under these specifications consists in making, furnishing, building, and placing the excavation and embankment and fill, the concrete masonry, the filter sand and gravel, the granolithic pavement of the courts required for the construction of a system of filters and pure-water reservoir, and the pipes and drains pertaining thereto. The cement for the concrete and certain other materials shall be supplied by the United States.

44. These specifications do not include the sand-washing apparatus, regulator houses, and fixtures above the substructures, the track system, pumping station and appurtenances, and other parts of the complete plant to be otherwise or subsequently supplied.

45. *Plans.*—The general extent, location, and character of the work are shown by a set of 23 plans, numbered from 1 to 23 consecutively, which plans are made a part of these specifications and which plans are on file at the office of the Washington Aqueduct.

53. *Disposal of excavated material.*—All materials suitable for use for puddle, or the requisite amount thereof, shall be set aside and reserved for this purpose and other select materials shall be reserved and used for embankments, filling, and for covering the filters. A part of the surplus material shall be de-

posited on the south slope of the dam and carried to such lines and slopes as the engineer officer in charge shall direct. All trees, bushes, and rubbish shall be cleared from the slope and adjacent ground at the foot of the dam before the material is deposited. The contractor must make all arrangements for the disposal of surplus material and hold the United States harmless against all claims whatever relating thereto.

57. *Work.*—The work under this heading includes the filling of low places under filters and other structures, the filling of central courts, the embankments about the filters, and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge.

58. *Classification.*—Embankments shall be divided into three classes:

(1) Embankment under filters.

(2) Embankments about the walls of filters and in courts.

(3) Filling over filters.

Material placed below the dam, in the roadways, and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment. When waste embankments come against the walls of the filters or the pure-water reservoir the usual section shall be built and paid for as embankment, and all material outside shall be treated as waste.

63. *Embankments about walls of filters and in courts—Item 3.*—These embankments shall be made as embankments under filters, except

that materials may be taken as they come in excavation without selection, except that soil or any manifestly unsuitable material shall be excluded, and may be placed in 6-inch layers instead of 3-inch layers, and the finished surface shall be left as nearly as possible at the desired grade, which, in the embankment about the filters, shall be approximately level within the springing line, and under courts shall be the required grade for the foundation of the pavement. Exposed surfaces shall be covered with soil and smoothed to the required surfaces.

293. *Work done by United States.*—The United States will construct the gatehouses, sand washers, pumping station, macadam roadways, and other structures not included in these specifications and necessary for the completeness of the plant, and the work to be done under these specifications shall be carried on so as to facilitate and not to discommode the prosecution of that and other adjoining and contiguous work, whether done by the United States or by another contractor.

Section 1 of the proposal provides, in part, as follows:

Class A.—For eight hundred and eighty thousand (880,000) cubic yards excavation, for sixty-five thousand four hundred (65,400) cubic yards embankment under filters, *for forty-six thousand seven hundred (46,700) cubic yards other embankment*, and for one hundred and twenty-three thousand four hundred (123,400) cubic yards filling over filters, all at thirty (30) cents per cubic yard; * * *.

Appellant sues to recover for 67,578 cubic yards of material deposited on said roadway at a contract price of 30 cents per cubic yard, amounting to the sum of $20,273.40.

His claim is that the fill on the said roadway was required of him by the contract; that the Government in making the said payments so construed the contract and estopped itself from otherwise interpreting the same; that aside from the contract appellant should recover on a *quantum meruit* for the material supplied and work performed.

The Government's position is that the face of the contract excludes the claim of damages for the fill on the roadway; that the decision of the engineer officer in charge at the time of final settlement was binding on the contractor; and that appellant could not recover on a *quantum meruit* for the reason that the work on the roadway was never requested by the Government and was to be performed at the expense of appellant.

BRIEF OF ARGUMENT.

First.—The contract on its face forecloses appellant's claim.

Second.—Appellant is not entitled to recover upon a *quantum meruit.*

FIRST.

The Contract on its Face Forecloses Appellant's Claim.

Appellant's contention is that because a roadway was indicated on the drawings and because paragraph 57 of the specifications required him to do the work

included in the phrase "all other fills and embankments shown by the plans" he should be paid for the material placed upon said roadway. Such an application would put into practice that which this court has inveighed against, namely, the carving of a phrase out of a context and reading it independently of the rest of the contract.

The purpose of the contract, *so far as appellant was concerned*, was the construction of embankments and fills relating to the filtration plant proper. Sections 57 and 58 and paragraph 1 of proposals indicate this very clearly.

Section 57 enumerates three kinds of fills, concluding as follows: "and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge."

Appellant argues that this concluding phrase includes work outside of the filtration plant proper, as, for example, the work on the roadway. The language, however, which precedes this phrase relates exclusively to work upon the filtration plant and indispensable to its construction and operation. Hence, "all other fills and embankments shown by the plans" must refer to fills and embankments necessary to the filtration plant and such as had been previously enumerated, to wit, the three kinds of fills theretofore described. Therefore the phrase is *ejusdem generis* of that which precedes it. This view is sustained by the classification in paragraph 58, wherein specifying in particular as to embankments it di-

vides them into three classes, corresponding to the kind set forth in paragraph 57:

> Paragraph 57:
>
> 1. Filling under filters and other structures.
> 2. Filling of central courts.
> 3. Embankments about the filters.
>
> Paragraph 58. Classification.—Embankments shall be divided into three classes.
>
> 1. Embankment under filters.
> 2. Embankments about the walls of filters and in courts.
> 3. Filling over filters.

The three classes in paragraph 58 relate to work on the filtration plant proper. Moreover, the use of the word "shall" indicates that the classification is mandatory. Unless, therefore, the fill on the roadway is comprehended within one of the three designated classes it does not come within the terms of the contract affecting appellant. Obviously the maxim, *Expressio unius est exclusio alterius* is applicable, and hence the description of the different kinds of "embankments" enumerated in paragraph 58 excludes every other kind from consideration. If under this clause it was contemplated that appellant was to fill the roadway, why was it necessary to make any classification whatsoever? The reasonable thing would have been for the contract to have contained one general clause requiring appellant to make all fills and embankments. If he was to fill over, under, and around the filters and *also the roadways* and to be paid for all of them, then it was wholly

unnecessary to define "fill" and "embankments" as in paragraph 58. The definition there set forth would have been superfluous.

But the language following the classification in paragraph 58 clearly excludes payment for the fill on the roadway when it says:

> Material placed below the dam, *in the roadways* and at other low places *for the purpose of disposing of it*, and material disposed of off the ground shall not be paid for as embankment.

Finally, a fatal objection to appellant's position is that neither the "proposals" nor the contract proper provided for this road fill, either expressly or by implication. By their silence they sustain the construction urged by defendants. Thus the specifications divided the work into seven items:

No. 1, excavation; Nos. 2, 3, and 4, embankment (which the specifications in terms subdivided into (1) embankment under filters, (2) embankments about the walls of filters and in courts, (3) filling over filters); No. 5, puddle; No. 6, seeding; No. 7, sodding. These terms were carried forward into the "proposals" (Specifications, p. 17), except "embankment around the walls of filters and in courts." Item No. 3 of the proposals was designated "other embankment." No new items were added, but approximate estimates of the amount required under the several items were given.

The contract proper, in terms, embodied the terms of the "proposals," without change. Obviously the

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item "other embankment" was here employed synonmously with "embankment about the walls of filters and in courts," and was not intended to cover the road. The approximate estimate of 46,700 cubic yards for the item "other embankment" forces this conclusion. This estimate is so small as to be utterly inconsistent with an intention to provide for the road fill, as the yardage claimed for filling the roadway alone is more than double that amount. Assuming a rough estimate to have been possible, it is inconceivable that in calculating the amount of road fill and the amount of fill required around the walls of filters and in courts the Government engineers would have found a total of only 46,700 cubic yards. The clear presumption is that no road fill was intended to be included. Its deliberate exclusion must have been due to the fact that the specifications made no provision for such work as a part of appellant's contract.

Furthermore, the substitution of the heading "other embankment" in item 3 of the "proposals," for "embankments about the walls of filters and in courts," in item 2 of paragraph 58 of the specifications, strikingly illustrates the point that the term "all other fills and embankments," etc., in paragraph 57, is *ejusdem generis* as the preceding matter in that paragraph, and the items given under the classification in paragraph 58, and lends a meaning to the phrase "all other fills and embankments" consistent with the language in paragraphs 57 and 58, and proposal 1.

An examination of the plans shows that the details with regard to the roadway were wholly lacking. Referring to sheet No. 2 presenting four cross sections of the natural surfaces upon which the filters were constructed, and indicating the relationship of the filters to said natural surface, the upper right-hand corner of each section shows a slight depression over which is the word "road." This is the road in question. It will be seen that there are no details as to direction, depth, width, etc.

Despite the fact that the road is far below the natural surface and is therefore a low place as compared with said surface and thus fitly described in the clause "roadways and at other low places," counsel says:

> The road embankment proposed was not, nor was its site, a "low place." It was, on the contrary, very much higher than the filters, and even before any embanking had begun its site was many feet higher in level than the level shown by the plan for the finished tops of the filters, as can readily be seen by consulting the plans which are a part of Finding IV. It is very strange that if the road embankment was meant it should be called "low." (App. brief, p. 17.)

The language in the specifications upon which appellant was bidding was, in its comparative and usual sense, descriptive of the conditions as represented on the plans and as they were before the work was undertaken. In this sense the road was low compared with the natural surface of the filter land, so

that it comes well within the descriptive phrase "excluding payment for material placed in the roadways and at other low places."

Mr. Justice Barney said (Rec. 18):

> An examination of the plans submitted with the proposals for the work shows that the roadway was indicated thereon, but contained no detail whatsoever as to exact location or dimensions. They merely mark where a roadway is to be placed.

It is more than passing strange, if appellant was to construct said road, that the plans should have done nothing more than indicate the roadway, whereas the very same plans in other details affecting appellant's work were profusely illustrative "as to exact location or dimensions." It is still more strange that if appellant company believed at the time the contract was signed that it was to do this work that it should have required detailed drawings of all other embankments and fills and yet been willing to bid without accurate or detailed information of this road. It is apparent that appellant company's failure to request information was due to the fact that the company was not to construct the road. It may clarify the situation to know that there was only one road to be constructed. Appellant's brief, page 2, says:

> The plans showed as a feature of the work a road or driveway to be constructed about the reservoir at a considerable height above the filter beds. There were other streets and roadways already existing which crossed or bordered on the plant. These were to be left

in existence and nothing was to be done on them; nothing was done on them and no question arises in reference to them.

Paragraph 293 of the specifications states that:

> The United States will construct the gatehouses, sand washers, pumping station, *macadam roadways, and other structures not included in these specifications* and necessary for the completeness of the plant * * *. [Italics ours.]

The roadway in question was macadamized. This was the only roadway to be built, and it was to be constructed by the United States. Hence the Government did not deem it necessary on the maps or in the specifications to give details to appellant. The company's action in accepting the plans and specifications without such details would indicate that it so understood.

Again, it is not customary for the Government to pay twice for one removal of earth unless it specifically provides for the same. The material taken out of the filters and placed on the roadway was paid for at the rate of 30 cents a cubic yard. This was a reasonable price. It included not only the excavating but *the removing*. When the Government paid for embankments under filters and in courts it paid for handling earth a second time. Thus in making the excavation for a filter and building up a concrete wall the earth removed had to be again handled in order to put it against the wall and in 6-inch layers. (Par. 63.) For example, earth

might have been excavated from a filter site, carried to a point for 30 cents per cubic yard, and subsequently the same earth carried back, put up against a wall in layers, and an additional 30 cents per cubic yard paid for it. But where earth is taken directly from an excavation and dumped, for which 30 cents per cubic yard is paid, as in this contract, an additional 30 cents per cubic yard should not be paid because the dirt, for convenience sake, happened to be thrown upon a roadway which the Government itself was to build. From sheet 2 of the drawings it is evident that the fill on the roadway came from the natural high surface above the site. The material was deposited upon the roadway without its being moved a second time. It must be kept in mind that appellant was paid 30 cents for every cubic yard that was deposited on the roadway during some stage of the construction of the plant. He is now apparently actuated to claim an additional 30 cents simply on the theory that the Government was able to make use of this dump in building its roadway. The placing of the material on the roadway did not cost appellant anything more than it would have cost to have removed it from the premises. In fact, sheet 2 of the drawings would indicate that as the filters were immediately contiguous to the roadway appellant could not have found a more inexpensive place to put the excavated earth. He had an opportunity to remove it to another place, of which he did not avail himself. It is said (Finding VI, Rec. 15) that "the roadway in question was just as

convenient a place as any to dispose of waste material." As Judge Barney says (Rec. 19):

> It thus appears to have been a privilege rather than otherwise for the contractors to have been allowed the right to deposit material excavated from the filter beds upon this roadway.

The findings show that while the Government engineers never ordered the contractor to build the roadway (Finding VI, Rec. 15), after the work was commenced the engineers "gave him the line of the toe of the slope" and from time to time furnished him the lines showing the direction of the road and the stakes showing the grade, and the depositing of the material was under the engineers' inspection.

Appellant argues that these facts, together with the indication of the road on the drawings, sustains his contention that the fill was provided for by the contract. But paragraph 293 required the Government to build a roadway and to so facilitate the work under the specifications as not to discommode the prosecution of the rest of the work. If appellant had had carte blanche in dumping the excavated material, without any guide or direction from the Government, he might have interfered with the rest of the work. It was therefore necessary to indicate where the material was to be deposited.

The fact that Col. Miller, the first engineer in charge, misunderstood the situation and allowed appellant company payments to the amount of

$12,000 on estimates for work done on this road does not bind the Government, as the United States can not be bound by its officials acting outside the contract where its terms are susceptible of only one interpretation.

As paragraphs 29, 57, and 285 give the engineer officer the final decision in the interpretation of the contract, it is maintained that the ruling of Col. Leech, the engineer officer in charge when the project was completed (as he had previously notified appellant he would rule), that the fill on the roadway was not to be paid for under the terms of the contract, ~~his decision~~ was final, in view of the fact that he was not charged with conduct implying bad faith. (*United States* v. *Gleason*, 175 U. S. 588–605.)

SECOND.

Appellant is Not Entitled to Recover Upon a Quantum Meruit.

Appellant should not recover upon a quantum meruit for the reason that the work upon the said road was not done at the request of the engineer officer in charge (Rec. 18) nor required of appellant by the drawings or the specifications. Moreover, it appears that the roadway was as convenient a place, and was less expensive than any other place, for the disposal of the waste material. As appellant was already paid 30 cents per cubic yard at some stage of the moving of the material to the roadway, it is maintained that he can not show loss, but on the

contrary a benefit. Unless appellant can show loss to himself he is estopped from an action upon a quantum meruit. (See *Plumley* v. *United States*, 226 U. S. 545–547.)

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be sustained.

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Assistant Attorney General.

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